In The

Supreme Court of the United States

October Term, 1977

No. 77-58

WILLIAM J. CHLEBORAD, M. D.,
Petitioner,

vs.

ROGER CHARTER, Individually and as Assignee,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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The Petitioner, William J. Chleborad, M. D., prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit rendered in these proceedings on March 22, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals, as yet unreported appears at Appendix A, infra, App. 1-5. The Order denying Petition for Rehearing is unreported and appears at Appendix B, infra.

JURISDICTION

The judgment of the Court of Appeals was filed March 22, 1977. See Appendix A, App. 1-5, infra. Subsequent thereto a Petition for Rehearing was timely filed and on the 11th day of April, 1977, an Order was entered that the Petition for Rehearing be denied (Appendix B). This Petition for Certiorari was filed less than ninety days from the date of the overruling of said Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

The trial court initially acquired subject matter jurisdiction on the basis of diversity of citizenship. Charter, Respondent, alleged the amount in controversy exceeded $10,000.00. The Respondent and Dr. Chleborad, Petitioner, were both citizens of Nebraska at the time of the incident complained of. However, prior to the filing of the complaint, the Respondent moved to the State of Iowa.

QUESTIONS PRESENTED

Roger Charter, Respondent, individually and as assignee, brought an action for damages allegedly sustained as a result of the claimed medical malpractice in the treatment of respondent by Dr. William J. Chleborad, Petitioner. At the trial, in order to prove the claim of negligence on the part of petitioner, respondent solicited the use of Dr. Joseph Lichtor, an orthopedic surgeon from Kansas City, as an expert medical witness. Following Dr. Lichtor's testimony, the defense called John Alder, an attorney from Overland Park, Kansas, as an impeachment witness to testify to the reputation of Dr. Lichtor for truthfulness and veracity in the Kansas City area.

On cross-examination respondent's counsel attempted to question Mr. Alder as to what insurance companies Mr. Alder represented. Petitioner's counsel objected to any questions concerning insurance and moved for a mistrial. The Court overruled the Motion for Mistrial but admonished counsel to stay away from the area of insurance. The jury returned a verdict in favor of petitioner and against the respondent, but the United States Court of Appeals for the Eighth Circuit reversed that judgment. The questions thereby arising are:

1. Whether the United States Court of Appeals erred in finding that a formal offer of proof under Fed. Rules Evid. Rule 103 (a) (2), 28 U. S. C. A. was unnecessary.

2. Whether the United States Court of Appeals erred in relying on "its opinion" to find that the "probative value of the evidence outweighs any danger of unfair prejudice" when, in effect, the test that should have been applied was whether the Trial Court abused its discretion under Fed. Rules Evid. Rule 403, 28 U. S. C. A.

3. Whether the Trial Court erred in finding that the plaintiff was not required, under Fed. Rules Evid. Rule 103 (c), 28 U. S. C. A. to request the court to allow examination of witness John Alder concerning insurance companies he represents out of the hearing of the jury.

4. Whether the Court erred in failing to find that the error of the Trial Court, if any, was harmless under Fed. Rules Evid. Rule 103 (a), 28 U. S. C. A.

STATUTORY PROVISIONS INVOLVED

Fed. Rules Evid. Rule 103 (a), 28 U. S. C. A.

> "Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> "(1) Objection. In case the ruling is one admitting evidence a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
>
> "(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. . . ."

Fed. Rules Evid. Rule 103 (c), 28 U. S. C. A.

> "Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury."

Fed. Rules Evid. Rule 403, 28 U. S. C. A.

> "Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Fed. Rule Evid. Rule 411, 28 U. S. C. A.

> "Liability Insurance. Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness."

STATEMENT OF FACTS

Roger Charter, respondent, was employed by the Department of Roads of the State of Nebraska as a highway flagman (C. A. Appendix, pp. 6 & 7).[1] On the 29th day of June, 1973, while acting as a flagman, a semi-truck operated by one Eugene Allen Schenck, struck respondent and as a result of the accident respondent sustained extensive injuries to his right and left lower legs (C. A. Appendix, p. 10).

1 Reference is to Appendix used on appeal before United States Court of Appeals for the 8th Circuit.

Dr. Chleborad, petitioner, rendered certain medical treatment to respondent after the accident, but because of irreparable tissue damage and extensive infection to the legs of respondent amputation of both legs below the knees was required (C. A. Appendix, p. 8).

Respondent received the sum of $100,000.00 from Eugene Allen Schenck and/or Hybrid Sales Company, for payment of the damages he sustained in the above described motor vehicle accident (C. A. Appendix, p. 11). Respondent then brought suit against the petitioner, claiming the petitioner was negligent in the treatment of the injuries respondent sustained in the motor vehicle accident and that said negligence was the cause of the amputation of his legs (C. A. Appendix, pp. 6-9). Trial of this matter was commenced on the 12th day of April, 1976, before the Honorable Robert V. Denney, Judge of the United States District Court for the District of Nebraska. At the trial of this matter counsel for respondent called Dr. Joseph Lichtor as an expert medical witness to testify against petitioner.

Counsel for petitioner called as an impeachment witness, John J. Alder, an attorney from Overland Park, Kansas (C. A. Appendix, p. 19). Mr. Alder testified to the reputation of Dr. Lichtor for truthfulness and veracity in the Kansas City area. Mr. Alder testified that "Dr. Lichtor's reputation for truthfulness in the Kansas City area is bad." (C. A. Appendix, p. 21).

During cross-examination of Mr. Alder by Mr. Mullin, counsel for respondent, the Court presented questioning of Mr. Alder as to what insurance companies Mr. Alder represented. The proceedings were as follows:

"Q. When Mr. Johnson came to look you up, do you have any idea how he happened to pick your name out of all the other lawyers in the Kansas City area?

A. Sir, I do not know that.

Q. Did you have any clients in common or do you today?

A. I don't know what clients Mr. Johnson has." (C. A. Appendix, p. 22)

The case was submitted to the jury for deliberation and on April 22, 1976, the jury returned a verdict in favor of the petitioner and against respondent.

Respondent filed a Motion for New Trial which was overruled and the appeal to the United States Eighth Circuit Court of Appeals followed.

The United States Court of Appeals reversed the judgment of the District Court and remanded the action with directions to grant the respondent a new trial.

REASONS FOR GRANTING THE WRIT

1. The decision of the United States Court of Appeals for the Eighth Circuit directly conflict with the pronouncement of this Court in Eichel v. New York Central Railroad Company, 375 U. S. 253 (1963).

In *Eichel v. New York Central Railroad Co.*, supra, this Court held that the likelihood of misuse by a jury of evidence of insurance greatly outweighed the probative value of the evidence. In so doing this Court stated:

"It has long been recognized that evidence showing that the defendant is insured creates a substantial likelihood of misuse. Similarly, we must recognize that the Petitioner's receipt of collateral insurance benefits involve a substantial likelihood of prejudicial impact."

In a concurring opinion, Mr. Justice Harlan stated:

"When a balance of this sort has to be struck, it should, except in rare instances, be left to the discretion of the trial Judge, subject to review for abuse. . . . It is he who is in the best position to weigh the relevant factors, such as the value of the disputed evidences compared with the other proof adducible to the same and the effectiveness of limiting instructions."

The United States Court of Appeals for the Eighth Circuit found there was no indication in the Briefs that a "particular prejudice was threatened". In the petitioner's Brief on Appeal, pp. 16 through 20, the petitioner made repeated references to the prejudicial nature of insurance.[2] The petitioner was unaware of any requirement that he must offer evidence to the effect that the mention of insurance before the jury would be prejudicial to his case. However, at page 17 of its Brief on Appeal petitioner stated:

"The legal authorities are replete with references to the prejudicial nature of the mention of insurance in the trial of a liability case." (Appendix C, App. 9).

In *Eichel* this Court emphasized that it is a long established principle of the law that a substantial likelihood of misuse will evolve in the admission of the evidence that

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2 Pages 16-20 of Petitioner's Brief on Appeal are set forth at Appendix C, infra.

the defendant is insured. Yet, the Eighth Circuit Court of Appeals found that the petitioner was obligated to introduce evidence showing the same. The statement of the Eighth Circuit Court of Appeals that there was "no indication in the record or briefs of the parties that any particular prejudice was threatened in this case," is absolutely contrary to the petitioner's Brief on Appeal. The petitioner's Brief on Appeal concentrated on the prejudicial nature of insurance and poisonous fact of the mention of insurance before the jury (Appendix C, App. 7-12).

2. The decision of the Eighth Circuit Court of Appeals directly conflicts with the decision of the Third Circuit Court of Appeals in Hunziker v. Scheidemantle, 543 Fed. 2d 489 (3d Cir. 1976).

In *Hunziker v. Scheidemantle,* supra, the Third Circuit Court of Appeals had an opportunity to examine the effect of Fed. Rules Evid. Rule 411, 28 U. S. C. A. on the admissibility of insurance. The Court emphasized that if evidence of insurance is to be offered on retrial:

"* * * the District Court should require the necessary foundation to be established outside the presence of the jury so that it may determine the admissibility of such evidence without prejudice to the rights of the parties."

Fed. Rules Evid. Rule 103 (c), 28 U. S. C. A. provides:

"In jury cases, proceedings shall be conducted to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury."

The Eighth Circuit Court of Appeals found that the respondent was not required by Fed. Rules Evid. Rule 103,

28 U. S. C. A. to request the Court to allow the examination of Dr. Alder out of the hearing of the jury. The Court held that:

> "Although this procedure is certainly favored, it is not required." (Appendix A, App. 5).

This is contrary to the mandate of Fed. Rules Evid. Rule 103, 28 U. S. C. A. and contrary to the findings of the Third Circuit Court of Appeals in *Hunziker v. Scheidemantle,* supra. Concerning Fed. Rules Evid. Rule 103 (c), 28 U. S. C. A. the Advisory Committee states:

> "In re McConnell, 370 U. S. 230, 82 S. Ct. 1228, 8 L. Ed. 2d 434 (1962), left some doubt whether questions on which an offer is based must first be asked in the presence of a jury. The subdivision answers in the negative. THE JUDGE CAN FORECLOSE A PARTICULAR LINE OF TESTIMONY AND COUNSEL CAN PROTECT HIS RECORD WITHOUT A SERIES OF QUESTIONS BEFORE THE JURY, designed at best to waste time and at worst 'to waft into the jury box' the very matter sought to be excluded." (Emphasis added.)

The Eighth Circuit Court of Appeals has taken away from the Trial Court its right to foreclose a particular line of testimony and has further found that a litigant is no longer required to protect his record by means of an offer of proof. This is contrary to Fed. Rules Evid. Rule 103 (c), 28 U. S. C. A. and to the pronouncement of the Third Circuit in *Hunziker v. Schneidemantle,* supra.

3. The decision of the United States Court of Appeals for the Eighth Circuit is in direct conflict with the finding of the Fifth Circuit Court of Appeals in the case of Mills v. Levy, 537 Fed. 2d 1331 (5th Cir. 1976) and pronouncement of the Seventh

Circuit in the case of Nanda v. Ford Motor Company, 509 Fed. 2d 213 (7th Cir. 1974) pertaining to the requirement of an offer of proof under Fed. Rules Evid. Rule 103 (a) (2), 28 U. S. C. A.

The Eighth Circuit Court of Appeals found that a formal offer of proof was not necessary under Fed. Rules Evid. Rule 103 (a) (2), 28 U. S. C. A. before the plaintiff could claim error in the Trial Court's limitation of the cross-examination of defense witness John Alder. Fed. Rules Evid. Rule 103 (a) (2), 28 U. S. C. A. specifically provides:

> "(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
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> • • •
>
> "(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked."

The Eighth Circuit found it possible for the plaintiff to circumvent the provisions of Fed. Rules Evid. Rule 103 (a) (2), 28 U. S. C. A. by finding:

> "However it is clear from the transcript, particularly the conversation between counsel out of hearing of the jury, that the Court was aware of the general *nature* of the evidence to be offered." (Emphasis added.) (Appendix A, App. 4).

Fed. Rules Evid. Rule 103 (a) (2), 28 U. S. C. A. requires that the Trial Court be aware of more than the "general *nature* of the evidence to be offered". (Emphasis added.) Rather, the requirement of the rule is that the

"*substance* of the evidence was made known to the Court by offer, or was apparent from the context within which the questions were asked." (Emphasis added.) Fed. Rules Evid. Rule 103 (a) (2), 28 U. S. C. A. The substance of the evidence was never made known to the Court in this action.

It is true that respondent's counsel advised the Court:

> "We are certainly entitled to go into this for the purpose of showing his interest when he comes in and goes into his reputation." (C. A. Appendix, Page 22).

However, that merely alerted the Court as to the general *nature* of the evidence respondent's counsel was attempting to elicit. It did not alert the Court to the *substance* of the evidence.

The questions which were asked of Mr. Alder, leading up to the Court's limitation of the cross-examination by respondent's counsel of Mr. Alder concerning the issue of insurance were as follows:

"Q. Who are your clients who hire you to defend those cases?

A. Well, there are insurance companies.

Q. Could you name some of them for us?

A. Yes.

Mr. Johnson: Your Honor, I don't see how this is relevant.

Mr. Mullin: Well, he has—

The Court: Step up here, gentlemen." (C. A. Appendix, p. 21).

The petitioner respectfully submits that the *substance* of the evidence was never made known from these questions. First, there were no questions or testimony before the Court up to that point in the trial to indicate that petitioner was insured by the St. Paul Fire and Marine Insurance Company. There certainly is no indication from the questions asked of Mr. Alder as to whether or not he represented the St. Paul Fire and Marine Insurance Company. If the trial Court was not aware of the answer to the question, how could it possibly know the substance of the evidence?

Likewise, if the substance of the evidence was so obvious to the trial Court, it would seem that the Eighth Circuit would at least want to inquire of counsel for respondent why he found it necessary to file an Affidavit in support of his Motion for New Trial setting forth the substance of the evidence.

Moreover, the issue is not whether Mr. Alder represented the St. Paul Fire and Marine Insurance Company, but whether the fact that he represented the St. Paul affected the truthfulness of his testimony. The only way Mr. Alder's representation of St. Paul could have possibly affected his testimony was IF HE WAS AWARE THAT DEFENDANT'S COUNSEL ALSO REPRESENTED THE ST. PAUL IN THE INSTANT CASE. Mr. Alder indicated he did not know that petitioner's counsel even represented the St. Paul Insurance Company. His testimony in that regard was as follows:

"Q. When Mr. Johnson came to look you up, do you have any idea how he happened to pick your name out of all the other lawyers in the Kansas City area?

A. Sir, I do not know that.

Q. Did you have any clients in common or do you today?

A. I don't know what clients Mr. Johnson has." (C. A. Appendix, p. 22).

If Mr. Alder did not know what clients petitioner's counsel had, how could he possibly have known of the St. Paul's involvement in this case as petitioner's insurer? The "substance of the evidence", therefore, clearly was not indicated by any questions asked by respondent's counsel and a formal offer of proof was an absolute requisite. The fact that Mr. Alder was unaware of the St. Paul's involvement renders irrelevant any question concerning his representation of that company.

In the case of *Mills v. Levy,* 537 F. 2d 1331 (5th Cir. 1976), the Court stated:

> "Finally, plaintiffs argued that the trial Court erred in sustaining objections to hearsay testimony about statements made by the deceased. On appeal it is argued that these statements fall within the 'dying declaration' exception to the hearsay rule. At the trial, however, no offer of proof was made as to the excluded evidence, and therefore error may not be predicated on its exclusion. Fed. R. Ev. 103 (a) (2)."

The mandate of the Fifth Circuit is clear and unambiguous. Fed. Rules Evid. Rule 103 (a) (2), 28 U. S. C. A. would require that an offer of proof be made as to exclude evidence if error is to be predicated on its conclusion.

In *Nanda v. Ford Motor Company,* supra, the Seventh Circuit stated:

> "Defendant also complains that the trial Court allowed it to call only one witness to rebut O'Shea's testimony. This exercise of discretion by the Judge

> was not an abuse as to the showing of prejudice. Since no offer of proof was made, there is no basis for finding of prejudice. A party cannot raise as error the exclusion of evidence unless its substance was made known to the Judge by offer or was apparent from the context. Proposed Federal Rules of Evidence, Rule 103 (a) (2) states this well-settled rule."

The Eighth Circuit has held that the trial court need not be aware of the *substance* of the evidence, but only the *nature* of the evidence. Fed. Rules Evid. Rule 103 (a) (2) requires that an offer of proof is necessary *unless* the substance of the evidence is obvious from the question asked. That is only possible where the answer is suggested by the question. If Respondent's counsel had asked Mr. Alder: "Is it true that you represent the St. Paul Fire and Marine Insurance Company", the substance of the evidence would have been obvious from the question. Here Respondent's counsel merely asked Mr. Alder to name the companies he represented. Respondent's counsel did not even know the substance of the evidence until he returned to his office to examine Martindale-Hubbell. He admits he could not have known that evidence at time of trial (C. A. Appendix, p. 27). Yet, the Eighth Circuit relaxed the requirement that the *substance* be known, and that if the trial court knew the *nature* of the evidence, that was sufficient. Such a holding is not permissible under the rule.

The Third Circuit and the Eighth Circuit differ in their interpretations of Fed. Rules Evid. Rule 403, 28 U. S. C. A. In the case of *Construction, Ltd. v. Brooks-Skinner Building Company,* 488 Fed. 2d 427 (1973), the Third Circuit stated:

> "The task of assessing potential prejudice is one for which the trial judge, considering his familiarity

with the full array of evidence in the case, is particularly suited. As noted in the Advisory Committee's commentary on Rule 403, 'Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission.' The practical problems inherent in this balancing of intangibles—of probative worth against the danger of prejudice or confusion—call for the vesting of a generous measure of discretion in the trial judge. WERE WE SITTING AS THE TRIAL JUDGE IN THIS CASE, WE MIGHT HAVE CONCLUDED THAT THE POTENTIALLY PREJUDICIAL NATURE OF THE EVIDENCE OF PROFITS OUTWEIGHED ITS PROBATIVE VALUE. HOWEVER, WE CANNOT SAY THAT THE TRIAL JUDGE ABUSED HIS DISCRETION IN REACHING THE CONTRARY CONCLUSION." (Emphasis added.)

In finding that the probative value outweighed the danger of unfair prejudice, the Eighth Circuit Court of Appeals sat as the trial Judge in the instant matter.

In a case construing Rule 403, *United States v. Birch*, 490 Fed. 2d 1300 (8th Cir. 1974) the same Circuit stated:

"Although evidence may be relevant, it is not necessarily admissible:

" 'Relevant evidence, then, is evidence that in some degree advances the inquiry, and thus has probative value, and is prima facie admissible. But relevance is not always enough. . . . There are several counterbalancing factors which may move the court to exclude relevant evidence if they outweigh its probative value. . . .'

"Among those counterbalancing factors, McCormick lists the danger that the facts offered may unduly arouse the jury's emotions of prejudice, hostility, or sympathy. ACCORDINGLY, WE HAVE SAID IT

IS THE TRIAL JUDGE'S DUTY TO WEIGH THE RELEVANCE OF THE EVIDENCE AGAINST THE POSSIBILITY OF PREJUDICE:

"This balancing of intangibles—probative values against probative dangers—is so much a matter where wise judges in particular situations may differ that a leeway of discretion is generally recognized.

"TO THIS END, THE TRIAL COURT IS VESTED WITH CONSIDERABLE DISCRETION AND WILL NOT BE OVERTURNED UNLESS IT HAS ABUSED THAT DISCRETION." (Emphasis added.)

In *United States v. Birch* the Eighth Circuit emphasized that a great leeway of discretion is allowed to the trial Court. In the instant action, where the probative value of the evidence was not made known to the trial Court by offer of proof, how can there possibly be an abuse of discretion of the trial Court in excluding the evidence of insurance? Furthermore, the Court of Appeals made no Finding as to whether an abuse of discretion existed.

4. The ruling of the Eighth Circuit Court of Appeals is contrary to the provisions of Fed. Rules Evid. Rule 103 (a), 28 U. S. C. A. that error may not be predicated on the exclusion of evidence unless a substantial right of the party is affected.

A finding was also made that the exclusion of the evidence affected a substantial right of the respondent.

The record establishes that defense witness Mr. Alder did not know that petitioner's counsel represented the St. Paul, or that the St. Paul was the insurer of Dr. Chleborad in this case. His testimony in that regard was as follows:

"Q. Did you have any clients in common or do you today?

A. I don't know what clients Mr. Johnson has." (C. A. Appendix, p. 22).

Therefore, any questions concerning Mr. Alder's representation of the St. Paul clearly lack probative value, as not tending to show interest or bias and, therefore, constituted harmless error.

There is nothing in the record upon which the Eighth Circuit could base its finding that the evidence had probative value, for the record is clear that Mr. Alder did not know that the St. Paul was involved in the case. To find as it did, the Eighth Circuit required to test the credibility of Mr. Alder and determine that he was perjuring himself when he stated, "I do not know what clients Mr. Johnson has." (C. A. Appendix, p. 22).

The task of determining the credibility of the witness without question lies at the trial level.

CONCLUSION

The questions here presented are of obvious import. The Federal Rules of Evidence have only recently been adopted by Congress. The direction of this court in the interpretation of these rules is compelled in light of the laxity by the Eighth Circuit herein displayed. Unity of application of these rules among the circuits is essential to their effectiveness and can only be achieved with the aid of this Court.

For these reasons a Writ of Certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 76-1558

ROGER CHARTER, Individually and as Assignee,
Plaintiff-Appellant,
vs.
WILLIAM J. CHLEBORAD, M. D.,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Nebraska

Submitted: January 13, 1977
Filed: March 22, 1977

Before LAY and ROSS, Circuit Judges, and WANGELIN,* District Judge.

PER CURIAM.

This is a diversity action to recover damages for alleged medical malpractice. In June of 1973, plaintiff was struck by a truck while working as a highway flagman. The accident caused extensive injuries to both of plaintiff's legs. Plaintiff was hospitalized and placed under the care of a general practitioner and defendant, a surgeon. Surgery was performed on both legs. As a result of severe complications plaintiff was transferred to another hospital where both legs were amputated above the knee.

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* The Honorable H. Kenneth Wangelin, United States District Judge for the Eastern and Western Districts of Missouri, sitting by designation.

The trial of the matter resulted in a jury verdict for defendant and the district court denied plaintiff's motion for a new trial. Plaintiff presents two issues on appeal. First, plaintiff argues that the district court erred in limiting the cross-examination of a rebuttal witness for the defense. Second, plaintiff objects to an instruction given to the jury relating to causation. We deal first with the evidentiary issue.

Plaintiff offered the testimony of Dr. Joseph Lichtor, M. D., a Kansas City, Missouri orthopedic surgeon. Dr. Lichtor testified as to his opinion of the requisite standard of care defendant should have used when treating plaintiff. He compared the treatment given and concluded that defendant had been negligent. Finally, Dr. Lichtor testified that the cause of the complications and subsequent amputations was defendant's negligence.

As a part of his rebuttal case, defendant offered the testimony of John J. Alder, an attorney from the Kansas City area. Mr. Alder testified that Dr. Lichtor's reputation for truth and veracity in the Kansas City area was bad. On cross-examination Mr. Alder testified that he did some defense work in medical malpractice cases. He also stated that some of his clients in those cases were insurance companies.

Plaintiff's counsel then asked him to name some of those companies and defendant objected to the relevancy of the matter. After a conference at the Bench[1] the district

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1 Defense counsel moved for a mistrial which was denied by the district court. The following discussion then occurred:

(Continued on next page)

court refused to allow further questioning on the subject of insurance. As plaintiff stated in his motion for a new trial, Mr. Alder was employed in part by the same liability carrier who represents defendant in this action.

It is well established that the existence of a liability insurance policy is not admissible to show one's negligence or other wrongful conduct. Fed. R. Evid. 411 (1975); C. McCORMICK, EVIDENCE § 201, at 479 (2d ed. 1972). This rule has its basis in the belief that such evidence is of questionable probative value or relevance and is often prejudicial. Advisory Committee's note, Fed. R. Evid. 411 (1975); 2 J. WIGMORE, EVIDENCE § 282a, at 133-34 (3d ed. 1940). Evidence of the existence of insurance may be offered for other purposes, however. *See, e. g., Corbett v. Borandi,* 375 F. 2d 265 (8th Cir. 1967); *Newell v. Harold Shaffer Leasing Co.,* 489 F. 2d 103 (5th Cir. 1974). Rule 411 of the Federal Rules of Evidence provides several examples:

> This Rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, *or bias or prejudice of a witness.* (Emphasis added.)

(Continued from previous page)

Plaintiff's Counsel: We are certainly entitled to go into this for the purpose of showing his interest when he comes in and goes into his reputation.

The Court: But now I don't want insurance to enter this case at all. We've been at this over a week.

Plaintiff's Counsel: Alright. I am not going into that. I just want to show—

Defendant's Counsel: He has already.

The Court: Stay away from that or I will declare a mistrial and we can start all over. Don't go into it any further or I sure will. Do you understand?

Plaintiff's Counsel: I understand, Your Honor.

In this case the fact that defendant's insurer employed Mr. Alder was clearly admissible to show possible bias of that witness. Defendant does not dispute this obvious import of Rule 411 but urges that for several reasons the district court's exclusion of the evidence was not reversible error.

First, defendant argues that plaintiff was required to make a formal offer of proof. Rule 103 (a) (2) of the Federal Rules of Evidence provides that error may not be predicated upon a ruling excluding evidence unless:

> The substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

However, it is clear from the transcript, particularly the conversation between counsel out of the hearing of the jury, that the court was aware of the general nature of the evidence to be offered.[2]

Based upon Rule 403 of the Federal Rules of Evidence[3] defendant also argues that the trial court acted within its discretion in excluding evidence of insurance. This argument is without merit. In our opinion the probative value of the evidence far outweighs any danger of unfair prejudice. Also, there is no indication in the record or

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2 See note 1, *supra.*

3 Rule 403 provides that: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

briefs of the parties that any particular prejudice was threatened in this case. Rule 403 was not designed to allow the blanket exclusion of evidence of insurance absent some indicia of prejudice. Such a result would defeat the obvious purpose of Rule 411.

Defendant's final argument against reversal is that any error was harmless and did not affect a substantial right of the plaintiff.[4] To pass on this argument we must view the total circumstances of the case. Plaintiff's claim rested for the most part on the credibility of his expert witness. When defendant undertook to impeach that witness plaintiff was entitled to attempt to show possible bias of Mr. Alder as surrebuttal. Considering the importance of expert testimony in this case we cannot conclude that the trial court's exclusionary ruling was mere harmless error. *Cf. Levitt v. H. J. Jeffries, Inc.*, 517 F. 2d 523 (7th Cir. 1975).[5]

Because we find that the exclusion of the above mentioned evidence requires reversal, we do not consider the validity of the causation instruction given to the jury. Accordingly, the judgment of the district court is reversed and the action is remanded with directions to grant the plaintiff a new trial.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT

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4 Fed. R. Evid. 103 (a) (1975).

5 Defendant also argues that plaintiff was required by Rule 103 (c) to request the court to allow the examination of the witness out of the hearing of the jury. Although this procedure is certainly favored, it is not required.

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

76-1558 September Term, 1976

Roger Charter, etc.,

Appellant,

vs.

William J. Chleborad, M. D.,

Appellee.

Appeal from the United States District Court
for the District of Nebraska

Petition of appellee for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

April 11, 1977

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
For the Eighth Circuit

CIVIL NO. 76-1558

ROGER CHARTER, Individually and as Assignee,
Plaintiff and Appellant,

vs.

WILLIAM J. CHLEBORAD, M. D.,
Defendant and Appellee.

Appeal from the United States District Court
for the District of Nebraska

Hon. Robert V. Denney, Judge

BRIEF OF APPELLANT

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of the Law Offices of Emil F. Sodoro, P.C.

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Attorneys for Defendant and Appellee

Appellee has difficulty in understanding this contention of Charter. In *Wellstat v. Jim Ryan Construction Company,* 160 Neb. 87, 69 N. W. 2d 308 (1955), which case is cited in the comment to N. J. I. 2.01 (a), the Supreme Court of Nebraska stated:

> "Where it is claimed that the conduct of another, not a party to the suit, was the sole proximate cause of the accident, such defense is not an affirmative

> plea in avoidance of the plaintiff's cause of action and imposes no burden of proof upon defendant with relation thereto but is one entirely consistent with and provable under the general issue."

That statement of the Supreme Court of Nebraska specifically provides that this claim does not impose a burden of proof upon the defendant but rather is provable entirely with the general issue. It is the plaintiff's burden to prove the general issue, not the defendant's. If the plaintiff failed to prove the general issue, most certainly the defendant would not step forward and offer the requisite proof for the defendant would then be proving the plaintiff's case. Therefore, since the claim that the conduct of one not a party to the suit was the sole proximate cause of the accident is provable under the general issue, the burden of proof on that issue is on the plaintiff.

II.

Charter has assigned as error the Court's restriction of the cross-examination of defense witness John J. Alder. A substantial portion of his brief has been devoted to arguments attempting to persuade this Court that the trial Court comimtted error in refusing to allow counsel for the appellant to question Mr. Alder concerning insurance. In examining this claim it is necessary to consider several of the Federal Rules of Evidence pertinent thereto. Rule 103 reads in part as follows:

> "(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> ". . . (2) Offer of proof. In case, the ruling is one excluding evidence, the substance of the evidence

was made known to the court by offer or was apparent from the context within which the questions were asked."

Rule 403 reads:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Rule 411 states:

"Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness."

Rule 403 is a codification of existing case law leaving to the discretion of the Court whether or not relevant evidence should be excluded because of its prejudicial character. The legal authorities are replete with references to the prejudicial nature of the mention of insurance in a trial of a liability case. In *Ryan v. Barrett,* 105 Vt. 21, 162 A. 793 (1932), the Court referred to the rule concerning the mention of insurance in the trial of a case. It is stated therein:

> "The rule is clear and generally understood that it constitutes reversible error to inject into a case the fact that an insurance company is defending the suit. . . . While this rule has its exceptions and limitations . . . *yet the exceptions and limitations are never to be used as an artifice to bring before the jury the poisonous fact of insurance.*" (Emphasis added.)

Whether or not testimony concerning insurance, even though relevant, is admissible for the purpose of impeachment is discretionary with the Court under Rule 403. If the Court determines that probative value of the evidence is outweighed by its prejudicial character, then the Court may properly exclude the evidence. In the case of *Anderson v. Welch,* 86 N. M. 767, 527 P. 2d 1079 (1974), the Court of Appeals of New Mexico was presented with this question. The Court stated:

> "Defendant may be discredited or impeached by contradictory evidence. . . . The evidence offered by plaintiff was contradictory. It was also admissible in evidence for impeachment even though it injected the matter of insurance into the case. . . . We recognize that the question of insurance before a jury can be prejudicial as well as proper and dignified. . . .
>
> "Because of this difference in view, to weigh the probative value of impeachment testimony versus the question of insurance rested in the sound discretion of the trial court.
>
> "If the trial judge had ruled on the admission or exclusion of the plaintiff's rebuttal witness his discretion would not have been disturbed on appeal."

Charter has failed to show how the Court abused its discretion in failing to allow questioning of Mr. Alder on cross-examination concerning the issue of insurance.

Moreover, it has long been the rule that a trial Judge has great discretion in determining what matters may be delved into on the cross-examination of a witness. In the case of *Basic Books, Inc. v. F. T. C.,* 276 F. 2d 718 (7th Cir. 1960), cross-examination of a witness to test his credibility was limited by the trial Court. Error was charged in restricting the cross-examination but the Seventh Cir-

cuit Court of Appeals held that there was no abuse of discretion in restricting the cross-examination of the witness. The Court stated:

> "The extent of cross-examination on collateral matters is peculiarly within the discretion of the trial judge. His action will not be interfered with unless there has been a plain abuse of discretion. U. S. v. Manton, 2d Cir., 1938, 107 F. 2d 834, Cert. den., 1940, 309 U. S. 664, 60 S. Ct. 590, 84 L. Ed. 1012. Needless protraction, conduct of an examination in a manner unfair to a witness, *undue inquiry into collateral matters to test credibility,* and the like, are elements of cross-examination which properly lie within the discretion of the trial judge and there can be no reversal except for abuse." (Emphasis added.)

In the case of *General Insurance Company of America v. Hercules Construction Company,* 385 F. 2d 13 (8th Cir. 1967), this Court was confronted with a claim of error in the refusal of a trial judge to permit testimony which was an attempt to impeach the credibility of a witness. As to the duty of the trial Court, this Court stated:

> "In ruling on the admissibility or exclusion of evidence, even though Rule 43, Federal Rules of Civil Procedure provides that the statute or rule (federal or state) which favors the reception of proffered evidence shall govern its admissibility, the trial court has an area of discretion. Absent a clear case of inclusion or exclusion, his ruling will stand as he is in the position to judge the exigencies of a particular case, and he has the duty to keep the trial within proper bounds. Therefore, his discretion when exercised within normal limits should not be disturbed." (Emphasis added.)

Rule 103 (b), Federal Rules of Evidence, provides that a party may not predicate error upon a ruling which excludes evidence unless a substantial right of the party is

involved and an offer of proof was made displaying to the Court the substance of the evidence or that the substance of the evidence was apparent from the question itself. Rule 411 of the Federal Rules of Evidence specifically provides for the exclusion of evidence of the existence of liability insurance of a party unless the evidence of insurance against liability is "offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness." Questions attempting to inject into a case the "poisonous fact of insurance" are prejudicial on their face. *Ryan v. Barrett,* supra.

Unless the trial Court is made aware of the purpose of the questioning through an offer of proof, how can it possibly be claimed that there was an abuse of discretion by the trial Court in refusing to eliminate from a trial which had already proceeded for one week the "poisonous fact of insurance"? It is claimed by counsel for Charter that the trial Court knew from counsel's remarks and from the context of the question asked that the eliciting of testimony concerning insurance was an attempt to impeach the credibility of Mr. Alder and that, therefore, a formal offer of proof was not necessary.

In The

Supreme Court of the United States

October Term, 1977

No. 77-58

WILLIAM J. CHLEBORAD, M. D.,

Petitioner,

vs.

ROGER CHARTER, Individually and as Assignee,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

Please see Appendix A and Appendix B of the Petition for a Writ of Certiorari.

JURISDICTION

Supplementing the jurisdictional facts set forth by Petitioner, when the Complaint was filed the Plaintiff-Respondent was a resident and citizen of Iowa and the Defendant-Petitioner was a resident and citizen of Nebraska, thereby creating diversity jurisdiction (C. A. Appendix 6).

QUESTIONS PRESENTED

Respondent accepts questions raised by the Petitioner at Pages 3 and 4 of the Petition for Writ of Certiorari.

STATUTORY PROVISIONS INVOLVED

Fed. Evidence Rule 411, 28 U. S. C. A.:

"Liability Insurance. Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. *This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of* agency, ownership, or control, or *bias or prejudice of a witness.*" (Emphasis supplied.)

STATEMENT OF THE CASE

Roger Charter, age 17 years, and a gifted athlete, was struck by a truck on June 29, 1973. He was promptly removed to a hospital at Fremont, Nebraska and placed under the care of Petitioner, a surgeon. Without seeking consultation with orthopedic or vascular specialists, or referring the patient to one of several hospitals staffed with such specialists in Omaha (35 miles distant), and without alerting the parents to the perils of orthopedic and vascular complications, tissue death, infection or possible amputation, Petitioner elected to close the wounds with retention sutures following emergency surgery and

thereafter enclosed both legs in circular plaster-of-paris casts from ankles to above the knees. Neither cast was split or bivalved to allow for swelling and facilitate continued observation of wound areas. Multiple medical complications developed in subsequent days. On July 9, ten days post-accident, Respondent was transferred by ambulance to the University of Nebraska Medical Center at Omaha, Nebraska. There, shortly after his admission, as a life-saving procedure, he underwent above-knee guillotine amputations of both legs (C. A. Appendix 6-9).

During trial, Plaintiff-Respondent called Joseph Lichtor, M.D., an orthopedic surgeon from Kansas City, Missouri, who testified at length, with reasonable medical certainty, concerning acts and omissions of the Defendant-Petitioner which, in his opinion, constituted a failure to exercise the requisite degree of medical care and skill. He further attributed the medical complications and ultimate bilateral amputations to this failure. As permitted under Rule 803 (18) of the Federal Rules of Evidence, he supported his opinions by repeated references to relevant learned treatises. (Note: No attempt has been made to specify those numerous and lengthy portions of the Record or Appendix in the Court of Appeals which support the above recitation of facts because such evidence is not directly involved with the issues raised in the Petition for Writ of Certiorari.) Dr. Lichtor was Respondent's principal medical witness.

As his final defense witness, after almost two weeks of trial, counsel for Petitioner called John J. Alder, a lawyer from Overland Park, Kansas, and elicited testimony concerning Mr. Alder's years of personal acquaint-

ance with judges in the vicinity of Kansas City, Kansas and Kansas City, Missouri—including Federal Judges "such as Judge Denney" (the trial judge in this case) (C. A. Appendix 19-20). Under continued questioning by defense counsel Johnson, witness Alder then proceeded, over objection, to characterize Dr. Lichtor as "a very winsome man . . . and very quick with a word" (C. A. Appendix 20-27). He concluded direct examination testimony by stating that "Dr. Joseph Lichtor's reputation for truthfulness in the Kansas City area is bad." (C. A. Appendix 21).

At no time had the name of John J. Alder been previously disclosed by Petitioner as a possible defense witness (C. A. Appendix 27).

On cross-examination by Plaintiff's counsel, Mr. Alder denied knowledge of the type of case which was being tried and further denied knowledge of having any clients in common with counsel for Dr. Chleborad (C. A. Appendix 20, 21). He testified, however, that he and his firm have represented doctors and hospitals in a number of cases through the years and that the clients who hire him to defend these cases are insurance companies (C. A. Appendix 21). When Respondent's counsel sought to ascertain the identity of these insurance companies to ascertain whether or not the Alder firm might be regular defense counsel for the identical carrier which was providing the defense for Dr. Chleborad, defense counsel objected upon grounds of relevancy and moved for a mistrial (C. A. Appendix 22). The trial judge then gave the following directive to plaintiff's counsel during a bench conference (C. A. Appendix 22):

> "Mr. Mullin: We are certainly entitled to go into this for the purpose of showing his interest when he comes in and goes into his reputation .

> "The Court: But now I don't want insurance to enter this case at all. We've been at this over a week.
>
> . . . . .
>
> "Stay away from that or I will declare a mistrial and we can start all over. Don't go into it any further or I sure will. Do you understand?
>
> "Mr. Mullin: I understand, Your Honor."

As reflected in the Affidavit of Robert D. Mullin attached to Plaintiff's Motion For New Trial (C. A. Appendix 26-28), and in the excerpt from the Alder firm's Martindale Hubbell Listing for 1976 which was attached to the Motion For New Trial and incorporated by reference, the St. Paul Fire and Marine Insurance Company is a regular client of the Alder law firm (C. A. Appendix 28-29). This is the same company which provided the liability insurance coverage for Dr. Chleborad in the present case (C. A. Appendix 29-30). Counsel for Respondent was unaware of this fact when he undertook his exploratory cross-examination of Mr. Alder and did not learn of it until after Mr. Alder had completed his testimony and departed from the Federal Building. (See Affidavit of Robert D. Mullin attached to Motion For New Trial, C. A. Appendix 26-28.)

ARGUMENT

QUESTION I.

A Formal Offer of Proof Was Unnecessary.

At the moment that his cross-examination was interrupted by opposing counsel's objection and motion for

mistrial, and by the trial court's directive to "Stay away from that or I will declare a mistrial and we can start all over. Don't go into it any further or I sure will . . . ", counsel for Respondent had no way of knowing whether or not witness Alder regularly served as attorney for the defense carrier in the Charter case. He was delicately attempting to explore this subject, while avoiding reference to Petitioner's liability insurance coverage, in an effort to uncover possible bias or prejudice in a damaging surprise witness. Under such circumstances must counsel for a party make a formal offer to prove that which he does not know?

The Nebraska Supreme Court has long followed what appears to be the majority rule with respect to omitting the requirement for an offer of proof on cross-examination. As set forth in Syllabus Paragraph 5 of *Rice v. American Protective Health & Accident Co.*, 157 Neb. 256, 59 N. W. 2d 378:

> "5. The rule that ordinarily in order to predicate error upon a ruling of the court refusing to permit a witness to testify, or to answer a specific question, the record must show an offer to prove the facts sought to be elicited, applies to the proponent of the witness *but not to cross-examination.*" (Emphasis by counsel.)

The rationale for the Nebraska rule is set forth in the Arkansas case of *Washington National Insurance Company v. Meeks*, 458 S. W. 2d 135 (1970), in which the Supreme Court of Arkansas held that a proffer of proof is not always necessary on exclusion of testimony sought to be elicited by cross-examination of an adverse witness. In so holding, the Arkansas Supreme Court stated as follows:

> " . . . While we recognize the wide latitude of discretion vested in the trial courts to control and limit cross-examination, we have not hesitated to find an abuse of discretion in undue limitations thereon or abridgement thereof. Arkansas State Highway Comission v. Dean, Ark (December 1, 1969), 447 S. W. 2d 334; Huffman v. City of Hot Springs, Supra."

Continuing:

> "We are not aware of any of our cases which require an offer of proof under the circumstances prevailing here. It is clearly the majority rule that the requirement of an offer of proof does not apply where the testimony excluded was sought to be elicited by cross-examination of an adverse witness, and it has even been said that prejudice may be presumed. (Cases cited.) It has been pointed out that, because of the exploratory nature of the examination, it is unreasonable to require the cross-examiner to make an offer of proof." (Cases cited.)

Also, see the Minnesota case of *Uhlman v. Farm Stock & Home Co.*, 148 N. W. 102, in which Syllabus paragraph 4 reads as follows:

> "4. Where proof is sought to be elicited on cross-examination, and is excluded, it is not necessary to make an offer of proof to present the question for review."

There also exists an additional reason why offer of proof should not be required under the circumstances involved in this appeal.

As announced in *United States of America v. Barash*, 365 F. 2d 395 (1966), an offer of proof need not be made where it would be futile. In the cited case, defense counsel's cross-examination was prematurely terminated by sustaining of objection thereto, coupled with a directive from the Court that counsel should "cut it out". Here,

while the trial Judge was less curt in his directive to "stay away from that", he was no less positive. In the face of this, we submit that a formal offer of proof would indeed have been futile.

Nor do we find a conflict between the lower Court's opinion on this subject and the cases cited by Petitioner at pages 10 and 11 of his Petition. In *Mills v. Levy,* 537 Fed. 2d 1331 (5th Cir. 1976), a Plaintiff was attempting to adduce evidence of objectionable hearsay testimony through his own witness, and failed to make any offer of proof after objection was sustained. And in *Nanda v. Ford Motor Company,* 509 Fed. 2d 213 (7th Cir. 1974), the Defendant was merely restricted as to the number of witnesses he might call to rebut the testimony of an adverse witness. Neither case involved a cross-examination effort to explore the bias or prejudice of an adverse witness.

Finally, Petitioner would have the writ issue because the court of appeals found that the trial court was aware of the "general nature" of the evidence to be offered, as distinguished from the "substance" of such evidence. This distinction, we suggest, is one of semantics rather than law.

In advising the trial court that the purpose of this questioning was to explore the interest of the witness, Petitioner did, in fact, make an offer of proof. Further, so apparent, was the substance of the evidence from the context within which the questions were asked that defense counsel anticipated in advance that if the questioning continued, witness Alder would be forced to disclose that the defense insurance carrier in the Charter case was

and is a regular client of his firm. So apparent was the substance of such evidence to the trial court that the Judge, himself, was immediately able to anticipate the direction and intent of the questioning and foreclose it with his exclusionary ruling and directive. The court of appeals did nothing more than hold that the requirements of Rule 103 (a) (2) of the Federal Rules of Evidence had been satisfied and that no additonal, formal offer of proof was necessary.

QUESTION II.

The decision of the Court of Appeals is tantamount to a holding that the trial Court abused its discretion under Federal Rule 403, 28 U. S. C. A.

Here again, we find ourselves involved with semantics rather than law.

Rule 403 provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice" etc. In reviewing the exclusionary ruling of the trial court the court of appeals made the following findings:

1. "In this case the fact that defendant's insurer employed Mr. Alder was clearly admissible to show possible bias of that witness" (following reference to Rule 411).
2. " . . . defendant also argues that the trial court acted within its discretion in excluding evidence of insurance. This argument is without merit."
3. " . . . the probative value of the evidence far outweighs any danger of unfair prejudice."
4. " . . . there is no indication in the record or the briefs of the parties that any particular prejudice

> was threatened in this case. Rule 403 was not designed to allow the blanket exclusion of evidence of insurance absent some indicia of prejudice. Such a result would defeat the obvious purpose of Rule 411."

These findings lead but to the obvious conclusion that the court of appeals found an abuse of discretion by the trial judge. When an opinion recites that it is "without merit" to argue "that the trial court acted within its discretion", it would seem redundant to require that the same holding be repeated in different words.

Here again, the purported conflicts between cited cases are more ethereal than real. In *Construction Ltd. v. Brooks-Skinner Building Company,* 488 Fed. 2d 427 (1973), the Third Circuit did nothing more than express its inability to find that the trial judge abused his discretion under circumstances far different from those in Charter. And in *United States v. Birch,* 490 Fed. 2d 1300 (8th Cir. 1974), a criminal case, the court of appeals did nothing more than affirm its prior holdings that it is the trial judge's duty to weigh the relevance of evidence against the possibility of prejudice and, secondly, re-affirm its long-standing rule that the ruling of a trial court will not be overturned unless the trial court has abused its discretion. Such we submit, is the holding of the court of appeals in Charter—coupled with the finding that the lower court did, in fact, abuse its discretion.

QUESTION III.

Respondent was not required to request that the Alder cross-examination be conducted out of the presence of the jury.

The Alder cross-examination never reached the stage where evidence was offered that the witness was regularly employed by Dr. Chleborad's liability insurance carrier, nor was there ever any reference to the possibility that Dr. Chleborad was himself protected by liability insurance in the present case. If and when defense counsel uncovered evidence that witness Alder regularly represented St. Paul Fire and Marine Insurance Company, assuming that cross-examination was permitted to proceed to this point, request could have been made at that moment to present additional evidence concerning the identity of the Chleborad carrier out of the presence of the jury. To the limited extent that the questioning had proceeded before the exclusionary ruling however, no evidence had been adduced which required that prior cross-examination should have been conducted in the absence of the jury. Petitioner, we suggest, claims error over a threatened evidentiary situation which never occurred. And once again, he fails to demonstrate that the cross-examination which preceded the exclusionary ruling was prejudicial.

Here, the court of appeals did nothing more than find that under the particular circumstances of this case, Respondent was not required by Rule 103 to request examination of witness Alder out of the hearing of the jury. In no sense is this holding in conflict with the footnote dictum expressed in the aircraft crash case of *Hunziker v. Scheidemantle,* 543 Fed. 2d 489 (3d Cir. 1976).

QUESTION IV.

The Exclusionary Ruling Was Not Harmless.

Did the restriction of cross-examination of witness Alder involve the denial of a substantial right? Most certainly so.

It has often been held that the refusal of proper cross-examination is, in fact, "a denial of an absolute right, and has generally been held to be sufficient ground for reversal." See *Washington National Insurance Company v. Meeks,* 458 S. W. 2d 135 (1970) and *Glassman v. Chicago, R. I. & P. Railway,* 147 N. W. 757. Also see *Harris v. Smith,* 372 Fed. 2d 802 (8 Cir. 1967) in which the court of appeals quoted with approval the following words of Judge Learned Hand in *Meaney v. United States,* 112 Fed. 2d 538 (2 Cir. 1940):

> " * * * It is true that the plaintiff did not make any formal offer of proof such as Rule 43 (c), Rules of Civil Procedure, provides for, but while that would have been useful, it was not an absolute condition upon availing himself of the error. * * * If the testimony was competent, its exclusion probably affected 'the substantial rights of the parties'. Rule 61."

Petitioner would have us believe that Mr. Alder's general observation that "I don't know what clients Mr. Johnson has" was legally binding upon Respondent and thereby foreclosed further questioning concerning bias or prejudice of the witness and somehow rendered the erroneous exclusionary ruling harmless. We leave the merit of this argument to the wisdom of the Court.

Further, even before the express authorization set forth in Rule 411, the courts of our land were in virtually unanimous agreement that evidence of liability insurance is normally admissible as a matter of right to show bias or partiality. As provided in Syllabus Paragraph 8 of *Smith v. Hornkohl,* 166 Neb. 702, 90 N. W. 2d 347:

> "8. Generally, on cross-examination of a witness, any fact may be elicited from him which tends to show his bias or partiality, and considerable latitude should be allowed counsel in attempting to do so."

The Nebraska Supreme Court considered this question in more precise form in *Lund v. Holbrook,* 153 Neb. 706, 46 N. W. 2d 130, when it stated as follows in Syllabus Paragraphs 8 and 9:

> "8. Where the fact of whether or not a party carries liability insurance is not relevant to some issue in the case it is not admissible.
>
> "9. If evidence is properly admissible for any purpose, it cannot be excluded for the reason that it tends to prejudice the party because it shows or tends to show that the party carries liability insurance."

We also refer the Court to the annotation in 4 A. L. R. 2d at Page 779 which relates to the admissibility in evidence of liability insurance to show bias or interest of a witness. As stated in the initial paragraph of Section 7 relating thereto:

> "It is usually held that it is permissible for plaintiff's counsel, when acting in good faith, to show the relationship between a witness and defendant's insurance company where such evidence tends to show the interest or bias of the witness and effects the weight to be accorded his testimony." (Numerous cases cited.)

Quite recently, in *Pickett v. Kolb,* 237 N. E. 2d 105 (1968), the Supreme Court of Indiana stated as follows:

> "It has long been the law in all jurisdictions of which we are aware that a witness may properly be cross-examined with respect to his interest in the litigation in question. He may be cross-examined with reference to his motives, his feelings, friendly or unfriendly towards the parties or other witnesses involved, his employment by either of the parties *or*

some third party, and the contractual relationship with reference to his interest in the litigation and any financial considerations that might have influenced him. . . .

"In other words, proof of liability insurance in and of itself is not admissible, but such a principle may not be expanded to the extent that it serves as a means of excluding otherwise competent evidence which is relevant to the issues involved in the trial. . . ." (Emphasis by counsel.)

And again in *Yates v. Grider,* 251 N. E. 2d 846 (Ind. App. 1969), the Indiana Appellate Court held that reversible error was committed in sustaining objection to a question by plaintiff's counsel on cross-examination of defendant's expert witness as to who had hired him to investigate the accident, since a witness may be cross-examined as to possible interest and motives in the litigation, despite the fact that the answer would have indicated that defendant was insured.

We observe no conflict between these cases, or the latest holding by the court of appeals in Charter, and the cited case of *Eichel v. New York Central Railroad Company,* 375 U. S. 253 (1963). In *Eichel* this Court held that the District Court properly excluded evidence of disability income payments received by plaintiff, as offered to impeach plaintiff's motives for not returning to work. It appears that such evidence was being offered through defendant's own witness rather than through cross-examination of an adverse witness concerning his bias or prejudice. Further, the Supreme Court opinion properly observed that any relationship between the receipt of collateral pension benefits and malingering was at most speculative. The circumstances in *Eichel* were far different from those in

Charter and the opinion itself preceded the adoption of Rule 411 by almost a decade.

V.

General Considerations Governing Review on Certiorari

It is difficult to envisage a case less deserving of review by this high court.

As provided in Rule 19 (Supreme Court Rules), a review on writ of certiorari will be granted "only where there are special and important reasons therefore." Such "special and important reasons" must relate to the problems beyond the academic or episodic "and should involve principles of importance to the public," as distinguished from the private interests of the parties to the litigation. *Rice v. Sioux City Memorial Parks Cemetery,* Iowa 1955, 75 S. Ct. 614, 349 U. S. 70, 99 L. Ed. 897.

Here, we perceive no such "special and important reasons." We find no principles, the settlement of which is of importance to the public, as distinguished from that of the parties. Instead, we find nothing more than a request for review of a ruling by a court of appeals upon the narrow question of whether or not a party, on cross-examination, may explore the bias or prejudice of an adverse witness, to the extent specifically authorized under Rule 411, 28 U. S. C. A. This question, we suggest, is both academic and episodic. It in no sense involves constitutional dimensions. And it peculiarly involves the private interests of the parties to this suit, as distinguished from any issue important to the public at large.

CONCLUSION

For the reasons presented, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert D. Mullin, of counsel for Respondent, hereby certify that on the 25th day of July, 1977, I mailed three (3) copies of the Brief For Respondent, correct first-class postage prepaid to:

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